

**REPORT OF THE UNIFORM COMMERCIAL CODE COMMITTEE**  
**OF THE**  
**BUSINESS LAW SECTION**  
**OF THE**  
**STATE BAR OF CALIFORNIA**  
**ON THE**  
**REVISIONS OF**  
**UNIFORM COMMERCIAL CODE ARTICLE 1—GENERAL PROVISIONS**  
**DRAFTED BY**  
**THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS**  
**AND**  
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## INTRODUCTION

This report of the Uniform Commercial Code Committee (the "UCC Committee") of the Business Law Section of the State Bar of California addresses Revised Article 1 of the Uniform Commercial Code (the "UCC"), as drafted and approved in its national uniform text by its sponsoring bodies, the National Conference of Commissioners on Uniform State Laws and The American Law Institute ("RA1"), for separate enactment in and by the various states, including the State of California. The report discusses in detail how RA1 would affect current California law.

Article 1 was first drafted in the 1950s. In 1963, it was enacted by the California Legislature as Division 1 of the California Uniform Commercial Code (the "California Commercial Code") and has not undergone revision until now. In the decades since enactment, not only have there been significant technological developments, but there have also been substantial changes in the way business is conducted. RA1 was promulgated to modernize the UCC and to reflect and accommodate these circumstances. Many of the changes are technical, but there are substantive changes as well, most notably changes affecting the choice of law applicable to transactions governed by the UCC.

This report summarizes the changes, if any, that each proposed provision of RA1 would effect in California law, and includes a summary of the affected provision of Division 1 of the California Commercial Code ("Existing California Division 1") or, if applicable, other California law on the subject matter covered by such provision. To help explain the effect of RA1 on California law, certain provisions of RA1 or Existing California Division 1 are compared to analogous provisions of the 1962 Official Text of the Uniform Commercial Code of the American Law Institute and the National Conference of Commissioners on Uniform State Laws, as amended (the "Prior Uniform Commercial Code") and in particular, Article 1 thereof ("Prior Uniform Article 1"). Where applicable, recommendations for modifications to RA1 are indicated in bold faced type. Unless a specific recommendation is made that a provision of RA1 be modified, the Committee recommends adoption of RA1. References to Sections are to Sections of RA1 and references to the Official Comments are references to such comments in RA1, unless otherwise specified.

Mindful of both the ever-growing importance of uniformity in our increasingly national economy and of the need to update a part of the UCC that has been relatively untouched for decades, **the UCC Committee recommends the prompt adoption in California of RA1 in essentially its uniform text.**<sup>1</sup>

## SUMMARY OF PRINCIPAL SUBSTANTIVE CHANGES

RA1 would effect several substantive changes to California law. Most significantly, RA1 would:

- Revise the choice of law provision (as more fully described in the section below analyzing Section 1-301 of RA1) to expand party autonomy in commercial transactions, thereby enhancing certainty and reducing the impetus to litigate certain issues, while at the same time preserving for California consumers the protections afforded them by California consumer protection laws.
- Add certain definitions to Section 1-201 of Prior Uniform Article 1 (Section 1201 of Existing California Division 1) and make certain other changes to effect medium

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<sup>1</sup> Although the Committee is committed to uniformity, this report does recommend, in a select number of provisions, a small number of minor variations in order to preserve some existing non-uniformities that have been in effect in California since the initial enactment of Division 1.

neutrality and otherwise facilitate the application of the UCC to electronic transactions. Certain other definitions are deleted or changed to reflect the evolution of business practices since the original promulgation of Article 1. In addition, certain defined terms are added because they are required by other modifications contained in RA1.

- Incorporate a new provision concerning the relationship between state law and the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq. (“ESign Act”), permitting California law to override federal law.
- Centralize in Article (Division) 1 the definition of “good faith” already applicable to all articles of the UCC (other than Article (Division) 5), which definition requires not only honesty in fact but also the observance of reasonable commercial standards of fair dealing.
- Delete from Article (Division) 1 the statute of frauds relating to personal property not covered by other statutory provisions that was contained in former Section 1-206 of Prior Uniform Article 1 (Section 1206 of Existing California Division 1). However, this change would have no substantive effect assuming implementation of the Committee’s recommendation to retain and codify Section 1206 of Existing California Division 1 outside of the UCC.

In addition, RA1 makes certain organizational modifications which are not intended to effect substantive change. The course-of-performance rules formerly contained in Articles 2 and 2A (Divisions 2 and 10 in California) are incorporated in a section of RA 1 also containing the related concepts of course of dealing and usage of trade. Certain definitional provisions in Prior Uniform Article 1, or portions thereof would be moved to new provisions dealing with notice (Section 1-202 of RA1), leases as distinguished from security interests (Section 1-203 of RA1) and the definition of value (Section 1-204 of RA1).

## **PART 1 – GENERAL PROVISIONS**

### **Section 1-101 – Short Titles.**

Subsection (a) of Section 1-101 of RA1, which provides a form of citation to the UCC generally, is the same as Section 1-101 of Prior Uniform Article 1 and Section 1101 of Existing California Division 1, which contains the official text of Section 1-101 of Prior Uniform Article 1. Accordingly, adoption of subsection (a) of Section 1-101 of RA1 would have no impact on California law.

Subsection (b) of Section 1-101 of RA1 has no predecessor in Prior Uniform Article 1, but its adoption would have no substantive effect on Existing California Division 1. This subsection of RA1 provides a form of citation to Article 1. As described in the Official Comment to Section 1-101 of RA1, the purpose of this subsection is to make the structure of Article 1 parallel with that of the other articles of the UCC, each of which contains a provision for a form of citation for the relevant article. As a stylistic matter, though, to be consistent with the citation format adopted for articles of the UCC in California, the reference to “article” in subsection (b) of RA1 should be modified to refer to “division.”

***Recommended Modification to RA1:*** *To conform to California legislative style, before being adopted in California, subdivisions (a) and (b) of Section 1-101 of RA1 should be modified to read as follows:*

- (a) This code shall be known and may be cited as Uniform Commercial Code.
- (b) This division may be cited as Uniform Commercial Code-General Provisions.

#### **Section 1-102 – Scope of Article.**

Section 1-102 of RA1 is a new provision, the adoption of which would have no substantive impact on California law. Section 1-102 of RA1 provides that Article 1 applies to a transaction to the extent that it is governed by another article of the UCC. As set forth in the Official Comments<sup>2</sup> to Section 1-102 of RA1, its purpose is to make clear what should be obvious but has actually been the source of some occasional confusion in the case law. That confusion is discussed in connection with Section 1-103 below.

#### **Section 1-103 – Construction of [Uniform Commercial Code] to Promote Its Purposes and Policies; Applicability of Supplemental Principles of Law.**

Section 1-103 of RA1 makes stylistic and conforming changes in provisions of Prior Uniform Article 1 that were adopted, without change, in California and would have no substantive impact on California law. Section 1-103 of RA1 combines subsections (1) and (2) of Section 1-102 and Section 1-103 of Prior Uniform Article 1. Subsections (1) and (2) of Section 1-102 of Prior Uniform Article 1 are reflected without significant change in subsection (a) of Section 1-103 of RA1, while Section 1-103 of Prior Uniform Article 1 is reflected without significant change in subsection (b) of Section 1-103(b). The provisions of Existing California Division 1 analogous to the sections of Prior Uniform Article 1 that are combined in Section 1-103 of RA1 (subdivisions (1) and (2) of Section 1102 and Section 1103 of Existing California Division 1) are consistent with Prior Uniform Article 1. Accordingly, adoption of Section 1-103 of RA1 would not substantively change California law.

According to the Official Comments to Section 1-103 of RA1, sections of Prior Uniform Article 1 have been combined because of they are interrelated. Official Comment No. 2 to Section 1-103 clearly states that the UCC is intended to displace all “...other law that is inconsistent with the purposes and policies of the Uniform Commercial Code, as well as its text.” Certain courts in jurisdictions other than California have had difficulties with Official Comment 1 to Section 1-103 of Prior Uniform Article 1, which provided for the application of other supplemental bodies of law except to the extent displaced.

The proposed rephrasing of the Official Comments to Section 1-103 of RA1 emphasizes the primacy of the UCC text and policies over supplemental bodies of law where Article 1 is applicable. Proposed Official Comment 3 expands upon this point by emphasizing that common law and equitable principles that are now embodied in statutes are also meant to be displaced by the UCC to the extent that the UCC addresses a particular situation.

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<sup>2</sup> The final text of RA1 refers to the comments that follow Section 1-102 as “Preliminary Comments” rather than “Official Comments.” Given that the comments to all other sections are labeled “Official Comments,” the Committee believes that such reference should have been a reference to “Official Comments” and has treated it accordingly.

Given the volume of reported decisions under Sections 1-102 and 1-103 of Prior Uniform Article 1, it is likely that parties will continue to litigate the extent to which the UCC has displaced other supplemental bodies of law. However, the shift in focus of the Official Comments should have a beneficial impact.

#### **Section 1-104 – Construction Against Implied Repeal.**

Section 1-104 of RA1 is substantively identical to Section 1-104 of Prior Uniform Article 1 and to Section 1104 of Existing California Division 1, except that the name of the section is modified by substituting the term “implied” for “implicit.” This section declares that the UCC is an integrated statute and occupies the entire area of law it addresses. Adoption of this section would not change California law.

#### **Section 1-105 – Severability.**

Section 1-105 of RA1 is substantively the same as Section 1-108 of Prior Uniform Article 1 and Section 1108 of Existing California Division 1, except for minor language improvements. Its adoption would not change California law.

#### **Section 1-106 – Use of Singular and Plural; Gender.**

Section 1-106 of RA1 is substantively the same as subsection (5) of Section 1-102 of Prior Uniform Article 1 and subdivision (5) of Section 1102 of Existing California Division 1. This section merely clarifies the effect of singular, plural and gender references, and its adoption would not change California law.

#### **Section 1-107 – Section Captions.**

Section 1-107 of RA1 does not differ from Section 1-109 of Prior Uniform Article 1. However, if enacted, it would add a new section to Existing California Division 1 that would be beneficial to California law. This section states that section captions are part of the text of the law and the proposed Official Comment makes it clear that such words are not “mere surplusage.”<sup>3</sup>

The California Code Comments to Existing California Division 1 explain that Section 1-109 of Prior Uniform Article 1 was not adopted because “[i]n the California code system section captions do not in any manner affect the scope, meaning or intent of the provisions of a section. This mandate is contained through the Codes. . . . Similar provisions appear in all existing California codes except the Civil Code and the Code of Civil Procedure.” While the Committee acknowledges this legislative construction, the Committee believes that section headings in the UCC, particularly in Article (Division) 1 are helpful in determining the scope of the relevant provision. Accordingly, in the view of the Committee, Section 1-107 of RA1 should be adopted.

#### **Section 1-108 – Relation to Electronic Signatures in Global and National Commerce Act.**

Section 1-108 of RA1 is a new provision. This section would permit California state law to override, in part, the federal ESign Act in accordance with the override requirements of Section 102(a) of the ESign Act. As discussed below, such an override would facilitate commercial transactions in

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<sup>3</sup> The Official Comments to this section note that this rule does not apply to subsection headings in Article 9 (Secured Transactions), because the sponsors of Article 9 did not approve the subsection headings as part of the approved text.

California under the UCC. According to the Official Comments to Section 1-108 of RA1, the proposed section does not affect the protections accorded to consumers by Section 101(c) of the ESign Act. Pursuant to Section 101(c), when applicable law requires information to be delivered to a consumer in writing, electronic delivery is inadequate absent affirmative consent and satisfaction of certain other federally mandated conditions.

Prior to the enactment of the ESign Act on June 30, 2000, California had adopted its own version of the Uniform Electronic Transactions Act as California Civil Code Sections 1633.1 et seq. (“California UETA”). California UETA applied to electronic records and signatures sent on or after January 1, 2000, but it has since been largely preempted by the ESign Act.

Because other provisions of the UCC and the California Commercial Code contemplate electronic signatures and other methods of “authentication” (see the definition of “authenticate” in Section 9102(a)(7) of the California Commercial Code), the Committee views it as desirable to have a uniform set of rules governing electronic signatures. However, both ESign and UETA, as adopted in various jurisdictions, including California, have been extensively criticized for a litany of deficiencies and omissions; neither presently establishes an entirely desirable legal standard for commercial activities. A bill to repeal California UETA and to replace it with a new Uniform Electronic Transactions Act was proposed but not enacted in California. Adoption by jurisdictions of Section 1-108 of RA1 would give uniformity to local laws preempting the ESign Act and could pave the way for implementation of a new Uniform Electronic Transactions Act.

Accordingly, the Committee recommends adoption of Section 1-108 of RA1, and such adoption should be borne in mind in future legislative efforts with respect to electronic signatures. After adoption of Section 1-108 of RA1, such future legislation may refer to Section 1108 of the California Commercial Code rather than expressly providing for the override of the ESign Act.

## **PART 2 – GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION**

### **Section 1-201 – General Definitions.**

Where a given subsection of Section 1-201 does not effect a substantive change or does not otherwise require mention, discussion is omitted.

*Section 1-201(b)(3):* The proposed definition of “agreement” in Section 1-201(b)(3) of RA1 cross-references Section 1-103 and omits the following language found in Section 1-201(3) of Prior Uniform Article 1 and Section 1201(3) of Existing California Division 1: “Whether an agreement has legal consequences is determined by the provisions of this code, if applicable, and otherwise by the law of contracts.” As pointed out in the Official Comment to this section of RA1, this modification merely deletes from the definition a concept otherwise addressed in Section 1-103 of RA1 and would not substantively change California law.

*Section 1-201(b)(4):* The proposed definition of “bank” in Section 1-201(b)(4) of RA1 would add to the prior definition contained in Section 1-201(4) of Prior Uniform Article 1 and Section 1210(4) of Existing California Division 1 (“a person engaged in the business of banking”) the illustrative examples of “savings bank, savings and loan association, credit union, and trust company.” These additions merely clarify that a “bank” can be any of an array of institutions providing financial services. These changes are consistent with the definition of “bank” in Section 9-102(a)(8) of Uniform Article 9 and in Section 9102(a)(8) of the California Commercial Code.

*Section 1-201(b)(6):* The proposed definition of “bill of lading” in Section 1-201(b)(6) of RA1 is similar to that in Prior Uniform Article 1, but the definition of “bill of lading” in Section 1201(6) of Existing California Division 1 is more expansive than the definition in Section 1-201(6) of Prior Uniform Article 1. The California definition includes the additional requirement that a bill of lading, by its terms, evidence the intention of the issuer that the person entitled under the document has the right to receive, hold, and dispose of the document and the goods it covers (and that the use of the term “bill of lading” is conclusive evidence of that intention). The California definition also expressly includes airbills, a reference that the drafters of RA1 describe as “no longer necessary.”

***Recommended Modification to RA1: There appears to be no reason to reconsider at this time the policy determinations which resulted in the adoption of the nonuniform definition of bill of lading contained in Section 1201(6) of Existing California Division 1 at the time of its enactment. Accordingly, before being adopted in California, Section 1-201(b)(6) of RA1 should be modified to read as follows:***

**“Bill of lading” means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and that, by its terms, evidences the intention of the issuer that the person entitled under the document (Section 7403(4)) has the right to receive, hold, and dispose of the document and the goods it covers. Designation of a document by the issuer as a “bill of lading” is conclusive evidence of that intention. “Bill of lading” includes an airbill. “Airbill” means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.**

*Section 1-201(b)(11):* The proposed definition of “consumer” in Section 1-201(b)(7) of RA1 is new to Article 1 (although the term is used in definitions appearing in Article 9), but is consistent with existing California law. *See, e.g.,* Cal. Civ. Code Section 1799.90(a), Cal. Com. Code Section 9102(a)(24)(A). This new definition is necessary and appropriate, because Section 1-301 of RA1 prescribes certain choice-of-law rules that apply when a party to a transaction is a consumer.

*Section 1-201(b)(12):* The proposed definition of “contract” in Section 1-201(b)(12) of RA1 differs in non-substantive ways from that in Section 1-201(12) of Prior Uniform Article 1 and the nearly uniform definition in Section 1201(11) of Existing California Division 1. RA1 defines a contract in terms of “the legal obligation that results from the parties’ agreement as determined by” the UCC and other applicable laws. Prior Uniform Article 1 and Existing California Division 1 use the words “as affected by” in lieu of the words “as determined by.” The Official Comments to the new proposed uniform definition state that the changes being effectuated in this definition are “minor stylistic changes.” These changes would not result in a substantive modification to California law.

*Section 1-201(b)(15):* The proposed definition of “delivery” in Section 1-201(b)(15) of RA1 no longer covers delivery of “certificated securities,” as do the definitions in Section 1-201(14) of Prior Uniform Article 1 and in Section 1201(14) of Existing California Division 1. The official comment to the proposed uniform definition states that the deletion was made because certificated securities are now dealt with more specifically in Section 8-301 of the UCC. Since California has adopted Section 8-301 of the UCC as Section 8301 of the California Commercial Code, the reason for this change as articulated in this Section of Official Comment to RA1 supports adoption of this revised definition.

*Section 1-201(b)(16):* The proposed definition of “document of title” in Section 1-201(b)(16) of RA1 is unchanged from the definition in Section 1-201(15) of Prior Uniform Article 1. The definition contained in Section 1201(15) of Existing California Division 1 differs from the uniform definition in that



the California version describes “gin tickets” and “compress receipts” as documents of title but does not describe as a document of title an “order for the delivery of goods.”

***Recommended Modification to RA1:*** *There appears to be no reason to reconsider at this time the policy determinations which resulted in the adoption of the nonuniform definition of “document of title” contained in Section 1201(15) of Existing California Division 1 at the time of its enactment. Accordingly, before being adopted in California, Section 1-201(b)(16) of RA1 should be modified to read as follows:*

**“Document of title” includes a bill of lading, dock warrant, dock receipt, warehouse receipt, gin ticket, or compress receipt, and any other document that, in the regular course of business or financing, is treated as adequately evidencing that that the person entitled under the document (Section 7403(4)) has the right to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by a bailee and purport to cover goods in the bailee's possession that either are identified as or are fungible portions of an identified mass.**

*Section 1-201(b)(17):* The proposed definition of “fault” in Section 1-201(b)(17) of RA1 makes non-substantive modifications in the order of certain words and adds the word “default” to Section 1-201(16) of Prior Uniform Article 1 and to Section 1201(16) of Existing California Division 1. The California Code Comment to Section 1201(16) of Existing California Division 1 states that, in adopting the definition, the terms “omission or breach” were substituted for the term “default” in prior law. The proposed amendment of the definition of “fault” would not have a substantive impact on California law.

*Section 1-201(b)(20):* The proposed definition of “good faith” in Section 1-201(b)(20) of RA1, while a modification of the definition contained in Section 1-201(19) of Prior Uniform Article 1 and Section 1201(19) of Existing California Division 1, is not new in the sense that it merely mirrors definitions of the term adopted in connection with other, recently completed revisions of the UCC. The proposed definition of “good faith” adds to the subjective “honesty in fact” standard the more objective standard of the “observance of reasonable commercial standards of fair dealing.” According to the Official Comments to Section 1-201 of RA1, modifications were made to other Articles (except Article 5) of the UCC over time to bring considerations of commercial reasonableness to bear on determinations of good faith made under those other Articles. Most recently, California adopted Section 9102(a)(43), which defines “good faith” for purposes of Division 9 of the California Commercial Code as “honesty in fact and the observance of reasonable commercial standards of fair dealing.” The Official Comment to RA1 states that only Article 5 continues to define “good faith” in terms of subjective honesty. (The Article 5 definition will, of course, continue to control matters governed by Article 5.) In that the revised definition brings the definition of “good faith” into harmony with the other Articles of the UCC, the Committee recommends adoption of this new definition.

*Deletion of “honor”:* Section 1-201(20) of Prior Uniform Article 1 and Section 1201(21) of Existing California Division 1 define “honor” as “to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.” A materially different definition of “honor” appears in Article (Division) 5 of the UCC where the term is largely used. See Section 5-102(a)(8) of the UCC; Section 5102(a)(8) of the California Commercial Code. RA1 deletes the definition from Article (Division) 1. While the term “honor” is also used elsewhere in the California Commercial Code (see, e.g., Section 2503(4)(b) relating to tender when such tender is accomplished by delivery of a nonnegotiable document of title and Section 7504(4) relating to a bailee's honoring a seller's instructions), the definition of “honor” in Existing California Division 1 does not appear to be instructive in interpreting those sections. Moreover, retention of the definition in light of the different definition in

Division 5 is likely to give rise to confusion. Accordingly, the Committee recommends the deletion of the definition of honor contained in Section 1201(21) of Existing California Division 1, which would be effected upon adoption of RA1.

*Section 1-201(b)(23):* The proposed definition of “insolvent” in Section 1-201(b)(23) of RA1 carries forward the three insolvency tests contained in Section 1-201(23) of Prior Uniform Article 1 and in Section 1201(23) of Existing California Division 1. However, Section 1-201(b)(23) makes one change in the definition that is consistent with existing California law. Generally ceasing to pay debts in the ordinary course of business does not render a party “insolvent” if the cessation occurs “as a result of a bona fide dispute.” While the wording of the definition of “insolvent” contained in Prior Uniform Article 1 and in Existing California Division 1 is consistent with the California Civil Code Section 3439.02(c) (which provides that, for purposes of fraudulent transfers, a debtor is “insolvent” if the debtor is generally not paying his or her debts as they come due), the comments to Section 3439.02 say that a court should consider bona fide disputes in determining whether a debtor has generally ceased to pay its debts. Accordingly, the change in the definition of “insolvent” effected by RA1 should properly be viewed as a beneficial clarification rather than a substantive change of California law.

*Section 1-201(25) of Prior Uniform Article 1 and Section 1201(25) of Existing California Division 1:* These provisions contain the definition of “notice,” which has been moved to Section 1-202 of RA1. See the discussion below regarding Section 1-202.

*Section 1-201(b)(28):* The proposed definition of “present value” contained in Section 1-201(b)(28) has been moved from its position as a subsection of the definition of “security interest” in Section 1-201(37) of Prior Uniform Article 1 and Section 1-201(36)(d)(iii) of Existing California Division 1, but is substantively unchanged.

*Section 1-201(b)(31):* The proposed definition of “record” in Section 1-201(b)(31) of RA1 is derived from Section 9-102(a)(69) of the UCC (which is identical to Section 9102(a)(69) of the California Commercial Code) and is substantively unchanged, except for an additional qualifier contained in Article (Division) 9 (“except as used in ‘for the record,’ ‘of record,’ record or legal title,’ and ‘record owner’”). The definition is medium-neutral and facilitates implementation of laws that operate independently of the mediums used. See Official Comment 4h to Section 9101 of the California Commercial Code. The Committee views the addition of this definition to Existing California Division 1 as beneficial and appropriate.

*Section 1-201(b)(35):* The proposed definition of “security interest” in Section 1-201(b)(35) of RA1 differs from the definition contained in Section 1-201(37) of Prior Uniform Article 1 and Section 1210(36) of Existing California Division 1, because portions of the prior definition now appear elsewhere in Article (Division) 1. The portion of the prior definition dealing with the distinction between leases and security interests has been moved to Section 1-203 of RA1, and the definition of “present value” now appears at Section 1-201(b)(28) of RA1. The remaining portions of the definition are substantively unchanged and similar to the corresponding language of Existing California Division 1.

*Section 1-201(b)(36):* The proposed definition of “send” in Section 1-201(b)(36) of RA1 is substantially the same as Section 1-201(38) of Prior Uniform Article 1, and, with one exception, Existing California Division 1 is substantially the same as Section 1-201(38) of Prior Uniform Article 1. The one exception is that the California definition of “send” adds a sentence providing that, when notices are required to be sent by registered or certified mail, proof of mailing is sufficient unless proof of receipt is required by use of the words “with return receipt requested.” The Committee believes that this California variation to the definition is no longer appropriate. First, the Committee believes that the variation has only limited applicability, as it only applies to those cases in which registered or certified mail is

requested “with return receipt requested” – not a common formulation in current practice. The Committee also believes that the variation’s structure is inconsistent with the structure of RA1 as proposed for adoption in California. The California variation mixes the concept of “send” (in this case by registered or certified mail) with the concept of “receipt” (proof of receipt is not required unless sent “with return receipt requested”). Under RA1, the concept of “receipt” is addressed in Section 1-202, not in the definition of “send.” It is the view of the Committee that the benefits to be derived from adoption of a uniform version of Section 1-201(b)(36) outweigh any benefits of the California variation, particularly in view of the variation’s limited applicability and structural inconsistency with RA 1.

*Section 1-201(b)(37):* The proposed definition of “signed” in Section 1-201(b)(37) of RA1 substitutes the words “intention to adopt or accept a writing” for the words “intention to authenticate a writing” contained in Section 1-201(39) of Prior Uniform Article 1 and Section 1201(38) of Existing California Division 1. The Official Comments to RA1 state that the “adopt or accept” language is derived from the definition of “authenticate” in Section 9-102(a)(7) of the Prior Uniform Commercial Code. Adoption of the new definition will help avoid the confusion that could result from the use of the word “authenticate” (which can refer to records that are not writings) in defining a term (“signed”) that refers to writings.

*Section 1-201(b)(38):* The proposed definition of “state” in Section 1-201(b)(38) of RA1 is new, but the addition of the definition to Article (Division) 1 merely conforms the UCC to other uniform state laws. The Committee views this change as beneficial.

*Section 1-201(b)(39):* The proposed definition of “surety” in Section 1-201(b)(39) of RA1 changes Section 1-201(40) of Prior Uniform Article 1 and Section 1201(39) of Existing California Division 1 by adding a party who is an “other secondary obligor.” The Official Comments refer to the Restatement (Third), Suretyship and Guaranty (the “Restatement”) for a discussion of the nature of secondary obligations generally. This change would make the statutory text more in line with the Restatement formulation, a desirable result. The Committee believes that California courts have generally interpreted Section 2787 of the California Civil Code, which sets forth a definition of “surety,” in a manner consistent with the Restatement definition of “secondary obligor,” in the sense that substance, not form, is determinative of a party’s status as a surety. The definition of “surety” contained in Section 1-201(b)(39) of RA1 being consistent in intent with the definition of “surety” contained in Section 2787 of the California Civil Code, the Committee believes that adoption of Section 1-201(b)(39) in California would maintain consistency within California law while preserving uniformity with the UCC.

*Section 1-201(b)(42):* The proposed definition of “warehouse receipt” in Section 1-201(b)(42) of RA1, as a receipt issued by a person engaged in the business of storing goods for hire, is unchanged from Section 1-201(45) of Prior Uniform Article 1. The analogous section in Existing California Division 1 (Section 1201(44)) is not uniform. Under existing California law, a warehouse receipt must (i) be a document, (ii) “evidence the receipt of goods for storage”, (iii) be issued by a warehouseman as defined in Section 7102 of the California Commercial Code, and (iv) by its terms, evidence the intention of the issuer that the “person entitled under the document” (as such phrase is defined in Section 7403(4) of the California Commercial Code) has the right to receive, hold and dispose of the document and the goods it covers. In addition, Section 1201(44) of Existing California Division 1 provides that designation of a document by the issuer as a “warehouse receipt” is conclusive evidence of such intention.

***Recommended Modification to RA1: There appears to be no reason to reconsider at this time the policy determinations which resulted in the adoption of the nonuniform definition of warehouse receipt contained in Section 1201(44) of Existing California Division 1. Accordingly, before being adopted in California, Section 1-201(b)(42) of RA1 should be modified to read as follows:***

**“Warehouse receipt” means a document evidencing the receipt of goods for storage issued by a warehouseman (Section 7102), and that, by its terms, evidences the intention of the issuer that the person entitled under the document (Section 7403(4)) has the right to receive, hold and dispose of the document and goods it covers. Designation of a document by the issuer as a “warehouse receipt” is conclusive evidence of that intention.**

#### **Section 1-202 – Notice; Knowledge.**

Section 1-202 of RA1 is derived from Section 1-201(b)(25)-(27) of Prior Uniform Article 1. Sections 1201(25)-(27) of Existing California Division 1 are substantively the same as Section 1-201(25)-(27) of Prior Uniform Article 1. Only one, desirable, substantive change is effectuated by this restructured provision.

Sections 1-201(25), (26) and (27) of Prior Uniform Article 1 (and the corresponding provisions in Existing California Division 1) define, respectively, “notice” (and, within that definition, “knows,” “knowledge,” “discover” and “learn”), “notifies” (and within that definition “gives” and “receives”), and when notice, knowledge or receipt of notice or notification are received by an organization so as to be effective. Because the provisions are substantive and not purely definitional, the concepts were removed to a new section in RA1. Subsections (a) through (f) of Section 1-202 of RA1 restructure the terms to separately define “notice,” “knowledge,” “discover,” when a person “notifies” or “gives” notice or notification, when a person “receives” notice or notification, and when notice, knowledge or notice or notification is effective in situations involving organizations.

The principal difference between proposed Section 1-202 and Prior Uniform Article 1 (and Existing California Division 1) is the elimination of the reference to the “forgotten notice” doctrine. Section 1-201(25)(b) of Prior Uniform Article 1 and Section 1201(25)(b) of Existing California Division 1 provide that a person has “notice” of a fact when, *inter alia*, “[h]e or she has received a notice or notification of it.” Under Section 1-201(26)(b) of Prior Uniform Article 1 and Section 1201(26)(b) of Existing California Division 1, to the extent that a notice has not come to the attention of a person, that person is still deemed to have “received” a notice when the notice “is duly delivered at the place of business through which the contract was made or at any other place held out by him or her as the place for receipt of these communications.” However, Section 1-201(25) of Prior Uniform Article 1 and Section 1201(25) of Existing California Division 1 also contain the statement, “[t]he time and circumstances under which a notice or notification may cease to be effective are not determined by this code.” As Official Comment 25 to Section 1-201 of Prior Uniform Article 1 notes, this sentence is intended to make clear that cases, such as *Graham v. White-Phillips Co.*, 296 U.S. 27 (1935), which sets forth the “forgotten notice” doctrine, are not overruled. The “forgotten notice” doctrine provides that a notice can be ineffective or cease to be effective, for example, as a result of a party’s forgetfulness or negligence or receipt by a person without knowledge of the matter that is the subject of the notice.

Given the need to provide certainty as to when a party has notice, Section 1-202 of Revised Article 1 provides that, if a notice has not come to a person’s attention, it is still “received” by that person if “it is duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications.” See Section 1-202(e) of RA1. Section 1-202(f) (which is identical to Section 1-201(27) of Prior Uniform Article 1 and Section 1201(27) of Existing California Division 1), further provides when notice, knowledge, or notice or notification received by an organization is effective. This restructuring of Sections 1-201(25), (26) and (27) of Prior Uniform Article 1 (and the corresponding provisions in Existing California Division 1) appears to be beneficial and consistent with the policies of

the UCC. Accordingly, the Committee recommends adoption of Section 1-202 of RA1 without modification.

### **Section 1-203 – Lease Distinguished from Security Interest.**

This section was moved from the definition of “security interest” in Section 1-201(37) of Prior Uniform Article 1. Paragraphs (b) through (d) of Section 1201(36) of Existing California Division 1 are substantively the same as the corresponding provisions in Prior Uniform Article 1; however, at the end of paragraph (c), California law adds a nonuniform provision relating to motor vehicles (Section 1201(36)(c)(vii) of Existing California Division 1).<sup>4</sup> The Committee believes that the nonuniform provision contained in California law should be retained and that its retention is not inconsistent with the goals of the UCC.

RA1 augments certain rules of interpretation contained in Prior Uniform Article 1 and Existing California Division 1. Section 1-201(37) of Prior Uniform Article 1 and Section 1-201(36) provide that “[r]easonably predictable” and “remaining economic life of the goods” are to be determined with reference to the facts and circumstances at the time the transaction is entered into.” Section 1-203 of RA1 does not change the rule of interpretation applicable to “remaining economic life of the goods,” but it augments statutory phrasing applicable to “reasonably predictable.” Under Section 1-203 of RA1, “‘reasonably predictable’ *fair market rent, fair market value or cost of performing under the lease agreement* must be determined with reference to the facts and circumstances at the time the transaction is entered into.” (Emphasis added). The additional wording, however, would not effect a substantive change in the law, because the term “reasonably predictable” is used only in connection with the determination of fair market rent, fair market value or cost of performing.

***Recommended Modification to RA1: There appears to be no reason to reconsider at this time the policy determination which resulted in the adoption of Section 1201(36)(c)(vi) of Existing California Division 1 at the time of its enactment. Accordingly, before being adopted in California, Section 1-203 of RA1 should be modified to add, after subdivision (c)(6) and prior to subdivision (d), a new subdivision (c)(7) to read as follows:***

**(7) In the case of a motor vehicle, as defined in Section 415 of the Vehicle Code, or a trailer, as defined in Section 630 of that code, that is not to be used primarily for personal, family, or household purposes, that the amount of rental payments may be increased or decreased by reference to the amount realized by the lessor upon sale or disposition of the vehicle or trailer. Nothing in this subparagraph affects the application or administration of the Sales and Use Tax Law (Part 1 (commencing with Section 6001), Division 2, Revenue and Taxation Code).**

### **Section 1-204 – Value.**

This section modifies the definition of “value” contained in Section 1-201(44) of Prior Uniform Article 1 (and the substantively uniform definition of “value” contained in Section 1201(43) of Existing California Division 1) to explicitly exclude from its application, not only Articles 3 and 4, but also Articles 5 and 6. This modification is not substantive, because, like the UCC itself, Divisions 5 and 6 of

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<sup>4</sup> The nonuniformity was added in recognition of judicial decisions that view a commercial lease of a car or trailer containing a terminal adjustment clause (“TRAC”) in conflicting ways: either as a true lease or a sale (disguised as a lease) that creates a security interest in the vehicle. Section 1201(37)(c)(vi) of Existing California Division 1 merely provides that a commercial lease of a car or trailer does not create a security interest merely because it includes a TRAC.

the California Commercial Code already contain definitions of “value” that replace the definition in Division 1. Section 6102(a)(15) of the California Commercial Code defines “value” as “fair market value,” and Section 5102(b) of the California Commercial Code adopts the definition of “value” contained in Sections 3303 and 4211 of the California Commercial Code.

### **Section 1-205 – Reasonable Time; Seasonableness.**

Section 1-205 of RA1 would not substantively change existing California law. Section 1-205 of RA1 is derived from subsections (2) and (3) Section 1-204 of Prior Uniform Article 1, which are substantively the same as subdivisions (2) and (3) of Section 1204 of Existing California Division 1. Subsection (1) of Section 1-204 of Prior Uniform Article 1 (and, correspondingly, subdivision (1) of Section 1204 of Existing California Division 1) has been moved to Section 1-302(b) of RA1.

### **Section 1-206 – Presumptions.**

Section 1-206 of RA1, which addresses presumptions, is virtually the same as Section 1-201(31) of Prior Uniform Article 1. Section 1210 of Existing California Division 1 is numerically different and worded somewhat differently from Section 1-201(31) of Prior Uniform Article 1 because of an historical anomaly and not because of a substantive difference between Existing California Division 1 and Prior Uniform Article 1. Accordingly, the Committee believes that California should adopt Section 1-206 of RA1 with only one modification—to exclude its application to Section 1307 (Prima Facie Evidence by Third-Party Documents) as proposed for adoption in California.

Originally, Section 1-201(31) of Prior Uniform Article 1 was not adopted in California, because, as described in California Comment 31 to Section 1201 of Existing California Division 1, there was concern in 1963 that the section defining “presumption” was inconsistent with California evidence law. However, in 1965, California Evidence Code Section 604 was enacted to describe the effect of presumptions affecting the burden of producing evidence and to differentiate the effect of such presumptions from that of presumptions affecting the burden of proof, addressed in California Evidence Code Section 606. Enactment of California Evidence Code Section 604 effectively eliminated the reason for California’s failure to adopt Prior Uniform Article 1’s definition of “presumption.” Accordingly, a definition of “presumption” tracking the language of California Evidence Code Section 604 was adopted as Section 1210 of Existing California Division 1 in 1967. Section 1210 of Existing California Division 1 uses the language of the California Evidence Code, instead of that of the Uniform Commercial Code.

For this reason, Section 1210 of Existing California Division 1 differs in two respects from the definition of “presumption” in Section 1-201(31) of Prior Uniform Article 1. First, Section 1210 of Existing California Division 1 provides that “presumptions” affect “the burden of producing evidence,” while Prior Uniform Article 1 states that “presumption” or “presumed” means that “the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.” Second, the definition contained in Existing California Division 1 provides that it does not apply in the case of Section 1202 (Prima facie evidence by third party documents).

The first difference between Section 1210 of Existing California Division 1 and Section 1-201(31) of Prior Uniform Article 1 was not intended as a substantive difference. The California Code Comments to Section 1210 indicate that the California Law Revision Commission felt that the new California law was substantively the same as Prior Uniform Article 1. The second difference between Section 1210 of Existing California Division 1 and Section 1-201(31) of Prior Uniform Article 1 reflects a difference between Section 1-202 of Prior Uniform Article 1 and Section 1202 of Existing California Division 1. As described below in more detail with respect to Section 1-307 of RA1 (the new section incorporating provisions of Section 1-202 of Prior Uniform Article 1 dealing with documents as

evidence), California adopted a non-uniform Section 1202 using language mirroring Evidence Code Sections 604 and 606 to distinguish between presumptions affecting the burden of producing evidence as opposed to those affecting the burden of proof.

***Recommended Modification to RA1:*** *To coordinate Section 1-206 of RA1 with Section 1-307 (as proposed to be modified in California), before being adopted in California, Section 1-206 should be modified to read as follows:*

**Except as otherwise provided in Section 1307, “presumption” or “presumed” means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.**

#### **Statute of Frauds (Section 1-206 of Prior Uniform Article 1)**

RA1 contains no counterpart to Section 1-206 of Prior Uniform Article 1 or the analogous provision contained in Section 1206 of Existing California Division 1. Those sections provide, subject to certain exceptions, that a contract for the sale of personal property is not enforceable by way of action or defense in the absence of a writing (a) indicating that a sale has been made between the parties at a stated or defined price, (b) reasonably identifying the subject matter and (c) signed by or on behalf of the party against whom enforcement is sought. However, the sections by their terms do not apply to sales that are subject to other Articles (Divisions) of the UCC which have their own statutes of frauds rules. In effect, then, such sections merely impose a writing requirement on sales transactions not otherwise governed by the UCC.

RA1 does not include such a provision, because the other articles of the UCC already make individual determinations as to requirements for memorializing transactions within their scope. Furthermore, the scope of RA1, as articulated in Section 1-102 of RA1, is limited to transactions governed by another article of the UCC. Accordingly, the inclusion of a provision such as Section 1-206 of Prior Uniform Article 1 would be inappropriate. The Committee, therefore, believes that Existing California Division 1 should be amended by deleting the general statute of frauds provision. However, at the same time, the Committee sees no reason at this time to change substantive law with respect to non-UCC transactions to which this statute of frauds might apply. Therefore, the Committee recommends that the adoption of RA1 should be accompanied by recodification of the rule in question into the California Civil Code.

***Recommended Modification to the California Civil Code:*** *Because the scope of RA1, as articulated in Section 1-102 of RA1, is limited to transactions governed by another article of the UCC, there is no reason to amend RA1 to include the general statute of frauds provision currently contained in Section 1206 of Existing California Division 1. However, there does not appear to be any justification to change substantive law with respect to non-UCC transactions to which the statute of frauds might apply. Accordingly, in connection with the adoption of RA1 in California, the provisions of Section 1206 of Existing California Division 1, as modified in the manner set forth below, should be recodified as Section 1624.5 of the California Civil Code as follows:*

#### **1624.5. Statute of Frauds for Kinds of Personal Property Not Otherwise Covered.**

**(1) Except in the cases described in subdivision (2) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars (\$5,000) in amount or value of remedy unless there is some writing which indicates that a contract for sale**

has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his or her authorized agent.

(2) Subdivision (1) of this section does not apply to contracts governed by the Commercial Code, including contracts for the sale of goods (Section 2201), contracts for the sale of securities (Section 8113) and security agreements (Section 9201 and 9203).

(3) Subdivision (1) of this section does not apply to a qualified financial contract as that term is defined in paragraph (2) of subdivision (b) of Section 1624 if either (a) there is, as provided in paragraph (3) of subdivision (b) of Section 1624, sufficient evidence to indicate that a contract has been made or (b) the parties thereto, by means of a prior or subsequent written contract, have agreed to be bound by the terms of the qualified financial contract from the time they reach agreement (by telephone, by exchange of electronic messages, or otherwise) on those terms.

### **PART 3 – TERRITORIAL APPLICABILITY AND GENERAL RULES**

#### **Section 1-301 – Territorial Applicability; Parties’ Power to Choose Applicable Law.**

##### **A. Introduction.**

Section 1-105 of Prior Uniform Article 1, enacted in 1963 without substantive change as Section 1105 of Existing California Division 1, sets forth three rules:

- The first is a party autonomy rule. This rule provides that the parties to a transaction covered by the UCC which bears a reasonable relation to California and another state or nation may agree that their rights and duties will be governed by the law of California or that of such other state or nation.
- The second is a conflict of laws rule which applies when the parties to a covered transaction have not made an effective selection under the party autonomy rule. This rule provides that, in the absence of such a selection, the California Commercial Code applies if the transaction bears an appropriate relation to California.
- The third rule provides for the primacy of specified rules in other Articles. In other words, Section 1-105 of Prior Uniform Article 1 and Section 1105 of Existing California Division 1 (i) list UCC provisions that specify the law applicable to transactions governed by certain other UCC Articles or Divisions, (ii) provide that those listed UCC provisions govern and (iii) provide that a contrary agreement is effective only to the extent permitted by those listed provisions.

Section 1-301 of RA1 (hereinafter “Section 1-301”) modifies the first two of those rules and updates the last one.



B. The New Party Autonomy Rule.

1. The Primary Change to the Existing Rule Eliminates the “Reasonable Relation” Limitation in Certain Cases.

For non-consumer transactions, Section 1-301(c) expands the range of party choice by eliminating the “reasonable relation” limitation. For such transactions, (i) an agreement in a domestic transaction that the law of the forum state or another state shall apply will be effective, whether or not the transaction bears a relation to the state designated and (ii) an agreement in an international transaction that the law of the forum state or another state or country shall apply will be effective, whether or not the transaction bears a relation to the state or country designated.

Section 1-301 was revised by the UCC’s sponsoring bodies (The American Law Institute and the National Conference of Commissioners on Uniform State Laws) after careful consideration of oral and written input from affected industries, lawyers, academics and others, for several reasons. Deletion of the “reasonable relation” limitation eliminates the litigation issue always present under the existing rule as to whether a reasonable relation actually existed. It also obviates the need, often felt by parties, to distort transactions by arranging gratuitous or fictitious contacts between the parties or the transaction and the chosen jurisdiction in order to satisfy the test. Importantly, it permits the choice of a jurisdiction that might have no relation to the transaction, because there are many instances when such a choice would be desirable and ought to be validated. For example, parties to a cross-border transaction each may be unwilling to accept the law of the counterparty’s state or nation but may be willing to accept the law of a neutral (but unrelated) jurisdiction. Another example is when the laws of related jurisdictions are uncertain and the parties prefer to have their rights and obligations governed by a body of law that is well-developed and well-known even though it is the law of an unrelated jurisdiction. The existence of legitimate reasons for choosing an unrelated law was long ago recognized by the Restatement (Second) Conflict of Laws (the “Restatement”) (*see* sec. 187, and particularly comment f).

The new rule, like the old one, is based on the policy that providing predictability and certainty to contracting parties is a major shared policy goal of all jurisdictions; the new rule simply carries out that policy in a manner more appropriate for the present. It should be borne in mind that the old rule was written in the early 1950s, before party autonomy had fully supplanted old conflicts rules (such as the place of making of the contract) and before it had been reflected in and developed by the Restatement.

The new party autonomy rule is more in line with current law, adopted in the 1990s in California and the rest of the nation, that is reflected in several other articles of the UCC (*see* UCC Sections 4A-507, 5-116, 8-110), and simply expands the rule already in force under Cal. Civ. Code 1646.5 (enacted in 1992), which eliminated the reasonable relation limitation with respect to transactions exceeding a specified dollar amount. Also, the new party autonomy rule is more in line with contemporary international norms.

Thus, in limited circumstances, as discussed more fully below, Section 1-301 will give parties to commercial transactions greater flexibility in selecting the applicable law; nevertheless, it is likely that the expanded party autonomy rule will not result in a change in the law applicable to most transactions. In most cases, parties to a commercial transaction will choose to apply the law of a jurisdiction that has a reasonable relation to their transaction, the choice of which would have been honored under the old rule. The new rule simply applies the beneficial expanded autonomy policy to a few cases at the margins (where the rule is not less needed merely because such cases may be infrequent) and serves in all cases to eliminate a potential litigation issue.

## 2. Limitations on the Application of the New Party Autonomy Rule.

It is important to understand that the expanded party autonomy power is carefully limited and is accompanied by appropriate safeguards.

First, and importantly, the new party autonomy rule is not a free-standing general conflict of laws rule that applies generally to all transactions, or even to all commercial transactions. Rather, it applies only when and to the extent another article of the UCC applies to the transaction. This point will be discussed in more detail below.

Furthermore, Section 1-301 itself contains four further limitations on its applicability: first, for transactions in which one of the parties is a consumer, Section 1-301 both preserves the reasonable relation test and also provides a special protective rule; second, the validation of the parties' selection of a foreign law does not apply to a purely domestic transaction; third, Section 1-301 contains an express "fundamental policy" exception; and, fourth, subsection (g) gives primacy to the conflicts rules specified in various other UCC sections.

Introduction of these limitations on the applicability of the choice-of-law rules in RA1 required the introduction of additional terms for instances when one or more of the parties to a transaction is a "consumer" and when the transaction is a "domestic transaction" or an "international transaction." These terms are not defined in Section 1-105 of Prior Uniform Article 1 or Section 1105 of Existing California Division 1. Section 1-301(a)(1) defines an "international transaction" as a transaction bearing a reasonable relation to a country other than the United States, and Section 1-301(a)(2) defines a "domestic transaction" as a transaction other than an international transaction. Section 1-201(b)(11) of RA1 defines the term "consumer" as an individual who enters into a transaction primarily for personal, family or household purposes (the standard familiar definition).

### (a) General Scope Limitation.

The new party autonomy rule applies only to transactions governed by the UCC.

Section 1-102 of RA1 provides that Article 1 "applies to a transaction to the extent that it is governed by another article of the [Uniform Commercial Code]." As Comment 1 to that section states: "This section makes clear what has always been the case—the rules in Article 1 apply to transactions to the extent that those transactions are governed by one of the other articles of the Uniform Commercial Code." Moreover, this point is expressly reiterated in subsection (b) of Section 1-301, which states: "This section applies to a transaction to the extent that it is governed by another article of the [Uniform Commercial Code]." Comment 1 to that section elaborates as follows:

First, this section is subject to Section 1-102, which states the scope of Article 1. . . . Thus, this section does not apply to matters outside the scope of the Uniform Commercial Code, such as a services contract, a credit card agreement, or a contract for the sale of real estate. This limitation was implicit in former Section 1-105, and is made explicit in Section 1-301(b).

During the course of the drafting process of Revised Article 1 and prior to its final approval by its sponsoring bodies, the American Law Institute and the National Conference of Commissioners on Uniform State Laws, some observers to the drafting process, including certain banking representatives, expressed concern that the new party autonomy rule might somehow interfere with established practice in certain transactions. Those expressing concern, however, failed to identify concrete examples where this might actually be the case. The UCC Committee concurs with the sponsoring bodies of Revised Article 1

that the circumstances of concern are all adequately addressed by Section 1-301: (i) when transactions are not governed by another article of the UCC, Section 1-301 does not apply and, thus, the party autonomy rule is not implicated; (ii) when matters are governed by federal law, the supremacy clause of the United States Constitution would cause federal law to preempt state law, rendering any change in the autonomy rule irrelevant, and (iii) finally, when transactions are subject to other articles of the UCC and subsection (g) of Section 1-301, discussed below, applies, that section preserves the primacy of the conflicts rules provided under those other articles of the UCC, unaffected by any change in the party autonomy rule (precisely in the same manner as existing Section 1105 currently provides for such primacy).

California case law with respect to the effectiveness of contractual choice of law provisions, as articulated in *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4<sup>th</sup> 459, 11 Cal. Rptr. 2d 330 (1992), and subsequent cases, and based largely on the Restatement, will continue to be applicable to transactions falling outside the scope of the UCC.

(b) Consumer Transaction Limitations.

Section 1-301 does not expand party autonomy in choosing the law applicable to a transaction when one of the parties is a consumer. The effect of the consumer limitation found in Section 1-301 is, first, to retain the “reasonable relation” test for consumer transactions, and, second, to add a new consumer protection provision that prevents parties from depriving a consumer of the benefit of a non-waivable consumer protection rule of the consumer’s home state through the use of a choice of law clause.

When one of the parties to a transaction is a consumer, Section 1-301(e)(1) continues prior law by providing that the law chosen to apply must bear a reasonable relation to the jurisdiction whose law has been selected; an agreement in a domestic transaction to apply the law of the forum state or another state, or an agreement in an international transaction to apply the law of the forum state or another state or country, is not effective unless the transaction bears a reasonable relation to the state or country designated.

In addition to preserving this aspect of existing law for consumer transactions, Section 1-301(e)(2) provides additional protection. In a transaction where one of the parties is a consumer (unless the transaction is a sale of goods, in which case a different rule may apply), Section 1-310(e)(2) specifies that the application of the law chosen by the parties to apply to such transaction, even if that law bears a reasonable relation to the transaction, may not deprive a consumer of the protection of any rule of law in the consumer’s state of residence which protects consumers and which may not be varied by agreement. With respect to sales of goods, Section 1-301(e)(2) provides that the application of the law chosen to apply to such transaction may not deprive a consumer of the protection of a consumer protection rule in effect in the jurisdiction in which the consumer makes a contract relating to the sale of goods and takes delivery of those goods, even if the consumer does not reside in that jurisdiction. This latter provision is intended to promote commerce by enabling sellers (consider, for example, a vendor at San Francisco International Airport who sells and on the spot delivers goods regularly, if not primarily, to customers who do not reside in California) to conduct business with consumer-buyers who buy and receive goods within a state other than the customer’s home state without the burden of having to determine each customer’s state of residence and comply with the consumer protection laws of that state.

While the provisions of Section 1-301 that protect consumers from losing the protections of their home state’s consumer protection laws as the result of a choice of law made by parties are new in the sense that Section 1105 of Existing California Division 1 does not explicitly address such situations, it is likely that a California court would achieve the same result by means of applying a “public policy”

exception as discussed below. It should also be noted that the change will probably have little effect on current business practices in the banking field, because, even in the absence of the express consumer protection provision of Section 1-301(e) described above and the express “fundamental policy” provision, discussed below, it is unlikely that a choice of law clause could be used successfully as a device to deprive a consumer-customer of the protection of non-waivable consumer protection rules of the consumer’s home state.

Moreover, legislatures that have enacted non-waivable consumer protection laws presumably would not want other parties to be able to deprive consumers resident in their respective states of the protection of those rules through use of a choice-of-law clause. Thus, the Committee believes that this new provision should be favored by the California legislature as a method of expressly protecting California residents from losing the benefit of protections of such non-waivable California consumer protection laws by means of the contractual selection of the law of another jurisdiction. Furthermore, the Committee believes that the California legislature should encourage other jurisdictions to adopt the same uniform rule, thereby protecting California consumers who are sued in the courts of another state. The special consumer protection rules of Section 1-301 are also in line with current international party autonomy rules in the consumer context.

In summary, the Committee believes that the new party autonomy rule has important benefits for commercial transactions governed by the UCC and is carefully confined to cases where its application is appropriate; at the same time, consumers will continue to be covered by the reasonable relation test and receive the added benefit of an express new statutory recognition applicable to non-waivable consumer protections.

(c) “Fundamental Policy” Exception.

The party autonomy rule contained in Section 1-301 is subject to an express “fundamental policy” exception. Section 1-301(f) provides that, in both commercial and consumer transactions, an agreement selecting the law of a particular state or country is not effective to the extent application of that law would be contrary to a fundamental policy of the state or country whose law would govern in the absence of such a choice-of-law agreement. While there is no definition of “fundamental policy” in the UCC, neither the introduction into the statutory text of this notion nor the use of this undefined term should be viewed as introducing an unacceptable level of uncertainty. Courts everywhere, including those of California, have always been alert to protect public policy interests. California transacting parties, and California lawyers and judges, are well-acquainted with the notion of a “public policy” limitation on their conduct generally and in the conflict of laws field in particular. A “public policy” limitation has been in the Restatement for over 40 years. Indeed, the Restatement rule set forth in section 187 was specifically adopted as California’s common law choice of law rule for contracts by the Supreme Court more than a decade ago in *Nedlloyd Lines B.V. v. Superior Court*, *supra*, and it has been applied in numerous California appellate cases. Moreover, while it is a universal notion, albeit rarely expressed in a statute, that courts will decline to enforce a choice of law clause when enforcement would lead to an abhorrent result, it is unlikely that the presence of subsection (f) of Section 1-301 will undermine the certainty that the party autonomy rule provides. The Official Comment to Section 1-301 makes clear that this is a “narrow” exception, a point also emphasized by the use of the term “fundamental,” which suggests that it is a limitation only rarely expected to be brought into play. The Comment goes on to point out that:

a court should not refrain from applying the designated law merely because this would lead to a result different than would be obtained under the local law of the State or country whose law would otherwise govern. Rather, the difference must be contrary to a public policy that is so substantial that it justifies overriding the concerns for certainty

and predictability underlying modern commercial law as well as concerns for judicial economy generally.

(d) Limitations Found in other Articles.

Subsection (g) specifies a list of sections in other articles of the UCC which, if applicable, override all other provisions in Section 1-301, including a choice of law made by the parties. This limitation is discussed more fully below.

C. The New Conflict of Laws Rule Applicable in the Absence of an Effective Designation by the Parties.

Section 1-301(d) provides generally that, in the absence of an effective choice of law by the parties, the rights and obligations of the parties are determined by the law that would be selected by application of the forum state's conflict of laws principles.<sup>5</sup> Thus, the rule under Former Section 1-105 which directed (conditioned upon the existence of an "appropriate relation") application of the forum's substantive law is abandoned in favor of a general rule that makes the forum's ordinary conflict of laws rules applicable to UCC issues just as they would be applied to non-UCC issues. This rule is more reasonable than the old rule, avoids the "appropriate relation" issue present under the old rule and is less likely to promote forum-shopping. It should be noted that even this rule is subject to the special consumer protection rule discussed above, so that even application of the ordinary conflict of laws rules of the forum may not deprive a consumer of the protection of the type of law described above that is in force in the jurisdiction of the consumer's residence (subject, of course, to the special provision described above for purchases of goods outside the consumer's home state). In addition, the general rule of Section 1-301(d) is inapplicable to the extent superseded by any of the provisions listed in Section 1-301(g) (relating to other Articles of the UCC), as discussed more fully below.

D. Primacy of Conflicts Rules in Other Articles of the UCC.

Like Section 1-105 of Prior Uniform Article 1, Section 1-301(g) provides that, where one of the listed provisions of other Articles of the UCC specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law cited (including the conflict of laws rules). The sections listed in Section 1-301(g) are the same as those cited in Section 1-105 of Prior Uniform Article 1. However, Section 1105 of Existing California Division 1 does not contain the reference to the applicable law section of the UCC article relating to funds transfers, contained in Article 4A of the Prior UCC and Division 11 of the California Commercial Code; so, enactment of Section 1-301 would correct this error in existing California law. In enacting Section 1-301(g), the listing of the referenced sections should be modified to conform to California Code numbering style as follows:

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<sup>5</sup> When the parties have not made an effective contractual designation of applicable law, California case law, with respect to transactions falling outside the scope of the UCC, utilizes what has been called the "governmental interest" approach. See, e.g., *Dixon Mobile Homes v. Walters*, 48 Cal. App. 3d 964; 122 Cal. Rptr. 202 (3d Dist., 1975). The governmental interest approach, first enunciated by the California Supreme Court in *Reich v. Purcell*, 67 Cal 2d 551, 63 Cal. Rptr 31 (1967), identifies the applicable law based upon the interests of the litigants and the jurisdictions involved. This conflicts case law would continue to govern transactions outside the scope of the UCC, and the effect of Section 1-301(d) is to make that same case law applicable to transactions within the UCC when the parties have not made an effective choice of law under Section 1-301.

**Recommended Modification to RAI:** *To conform to California legislative numbering style, before being adopted in California, subparagraphs (1) through (8) of Subdivision (g) of Section 1301 should be modified to read as follows:*

- (1) Section 2402;
- (2) Section 4102;
- (3) Section 5116;
- (4) Section 6103;
- (5) Section 8110;
- (6) Sections 9301 through 9307;
- (7) Sections 10105 and 10106;
- (8) Section 11507.

E. Interaction With Other Non-UCC Statutory Provisions.

Another California statute also provides a rule that governs some contractual choice-of-law provisions.

Section 1646.5 of the California Civil Code provides that, with respect to a transaction involving, in the aggregate, \$250,000 or more, the parties may agree that California law governs their rights and duties in whole or in part, irrespective of whether the contract, agreement, understanding or transaction bears a reasonable relation to California. Thus, with respect to transactions covered by that provision which involve a contractual choice of California law, the California Legislature eliminated the “reasonable relation” test a decade ago. That provision expressly covers transactions otherwise governed by subdivision (1) of Section 1105 of the Existing California Division 1, but does not apply to any contract, agreement or undertaking for labor or personal services, any contract, agreement or undertaking relating to any transaction primarily for personal, family or household purposes, or, to the extent provided to the contrary in subdivision (2) of Section 1105 of Existing California Division 1. This section of the California Civil Code must be amended, not to effect any change in existing California law or policy, but simply to refer correctly to the appropriate provisions of Revised Division 1. The Committee therefore recommends that certain modifications be made to Section 1646.5 of the California Civil Code.

**Recommended Modification to California Civil Code:** *To conform statutory references in Section 1646.5 of the California Civil Code in connection with the adoption of RAI in California, Section 1646.5 should be modified to read as follows:*

**1646.5.** Notwithstanding Section 1646, the parties to any contract, agreement, or undertaking, contingent or otherwise, relating to a transaction involving in the aggregate not less than two hundred fifty thousand dollars (\$250,000), including a transaction otherwise covered by subdivisions (a) through (f) of Section 1301 of the Commercial Code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not the contract, agreement, or undertaking or transaction bears a reasonable relation to this state. This section does not apply to any contract, agreement, or undertaking (a) for labor or personal services, (b)

**relating to any transaction primarily for personal, family, or household purposes, or (c) to the extent provided to the contrary in subparagraph (7) of subdivision (g) of Section 1301 of the Commercial Code.**

**This section applies to contracts, agreements, and undertakings entered into before, on, or after its effective date; it shall be fully retroactive. Contracts, agreements, and undertakings selecting California law entered into before the effective date of this section shall be valid, enforceable, and effective as if this section had been in effect on the date they were entered into; and actions and proceedings commencing in a court of this state before the effective date of this section may be maintained as if this section were in effect on the date they were commenced.**

#### **Section 1-302 – Variation by Agreement.**

Section 1-302 of RA1 incorporates subsections (3) and (4) of Section 1102 of Prior Uniform Article 1 (subdivisions (3) and (4) of Section 1102 of Existing California Division 1) relating to the ability to vary the effect of provisions of the UCC by agreement, and subsection (1) of Section 1204 of Prior Uniform Article 1 (subdivision (1) of Section 1204 of Existing California Division 1) relating to the ability of parties to fix by agreement the time for any action to be taken. Adoption of Section 1-302 of RA1 would have no substantive effect upon California law.

#### **Section 1-303 – Course of Performance, Course of Dealing, and Usage of Trade.**

Section 1-303 of RA1 incorporates into a single provision of RA1 the course of performance rules now found in Sections 2-208 and 2A-207 (Sections 2208 and 10207 of Existing California Division 1) and the course of dealing and usage of trade rules now found in Section 1-205 of Prior Uniform Article 1 (Section 1205 of Existing California Division 1). In the course of that reorganization, RA1 changes the wording of some provisions but effects no material substantive change.

Subsections (a), (b) and (c) of Section 1-303 of RA1 define “course-of-performance,” “course-of-dealing” and “usage-of-trade,” respectively. The definition of “course-of-performance” in subsection (a) is substantively the same as the definitional portions of Sections 2208 and 2A-207 of the Prior Uniform Commercial Code and Sections 2208 and 10207 of the California Commercial Code. The definition of “course-of-dealing” in subsection (b) is substantively the same as subdivision (1) of Section 1205 of Prior Uniform Article 1 and subdivision (1) of Section 1205 of Existing California Division 1. The definition of “usage-of-trade” in subsection (c) differs from the definition of that term set forth in subsection (2) of 1-205 of Prior Uniform Article 1 and subdivision (2) of Section 1205 of Existing California Division 1 primarily in substituting the word “record” for “writing” in order to achieve medium neutrality. Subsection (g) of Section 1-303 of RA1 (addressing the admissibility of evidence of usage of trade) is substantively the same as subsection (6) of Prior Uniform Article 1 and subdivision (6) of Section 1205 of Existing California Division 1.

Subsection (d) of Section 1-303 of RA1 provides that a course of performance, course of dealing, or usage of trade is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms, and may supplement or qualify terms of an agreement. Similarly, Subsection (f) of Section 1-303 of RA1 generally provides that a course of performance is relevant to show a waiver or modification of a term inconsistent with the course of performance. While restructured, these subsections are consistent with prior law embodied in Section 1-205(3) of Prior Uniform Article 1 and Section 1205(3) of Existing California Division 1 which provide that a course of dealing and any usage of trade give particular meaning to and supplement or qualify terms of an agreement.

Subsection (e) of Section 1-303 of RA1 carries forward the hierarchy articulated in Section 1205 of Prior Uniform Article 1 and Section 1205 of Existing California Division 1, incorporating “course of performance” into that hierarchy. Under subsection (e), express terms prevail over course of performance, course of dealing and usage of trade; course of performance prevails over course of dealing and usage of trade; and course of dealing prevails over usage of trade. This provision is consistent with Section 1-205(4) of Prior Uniform Article 1 and Section 1205(4) of Existing California Division 1, which provide that, for purposes of interpretation, express terms of an agreement prevail over course of dealing and usage of trade and course of dealing prevails over usage of trade.

The Committee believes that Section 1-303 is not only consistent with existing California law but has the beneficial effect of reorganizing course of performance, course of dealing and trade usage concepts into a coherent whole. Accordingly, the Committee recommends adoption of Section 1-303.

#### **Section 1-304 – Obligation of Good Faith.**

Section 1-304 of RA1 is identical to Section 1-203 of Prior Uniform Article 1 and Section 1203 of Existing California Division 1. These provisions recognize that every contract or duty within the UCC imposes an obligation of good faith in its performance and enforcement.

#### **Section 1-305 – Remedies to be Liberally Administered.**

Section 1-305 of RA1 is substantively identical to Section 1-106 of Prior Uniform Article 1 and Section 1106 of Existing California Division 1. These provisions provide for liberal administration of remedies provided by the UCC, limit consequential, special and penal damages except as specifically provided in the UCC or another rule of law, and provide that any right or obligation provided by the UCC is enforceable by action unless the provision declaring it specifies a different and limited effect.

#### **Section 1-306 – Waiver or Renunciation of Claim or Right After Breach.**

Section 1-306 of RA1 is intended to modernize the law by introducing medium neutrality and to make explicit the requirement that waiver or renunciation of a claim or right requires the agreement of the waiving or renouncing party.

Section 1-107 of Prior Uniform Article 1 and Section 1107 of Existing California Division 1 contemplate waiver or renunciation of a claim upon the “delivery” of a “written waiver or renunciation.” Section 1-107 of Prior Uniform Article 1 and Section 1107 of Existing California Division 1 merged two different concepts: a party’s agreement to forgo certain rights and how that agreement is manifested. Section 1-306 of RA1 separates these concepts. Section 1-306 of RA1 first requires an agreement by a party and then requires that the agreement be reflected in an authenticated record (which allows for electronic communication).

The Committee views these modifications to existing law to be beneficial and recommends adoption of Section 1-306.

#### **Section 1-307 – Prima Facie Evidence by Third-Party Documents.**

Section 1-307 of RA1 provides that a document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher’s or inspector’s certificate, consular invoice or any other document authorized or required by a contract to be issued by a third party is prima facie evidence of its own authenticity and genuineness and of the facts stated herein. Paragraph 4 of the Official Comments to Section 1-307 of RA1 states that documents governed by this section need not be writings if



records in another medium are generally relied upon in the context. The Committee believes that this principle should guide the interpretation of this section in California. However, the Committee also believes that Section 1-307 should be modified to retain California's statutory formulation of the law regarding the evidentiary effect of third-party documents.

Section 1-307 of RA1 is substantively identical to Section 1-202 of Prior Uniform Article 1. While California initially adopted Section 1-202 of Prior Uniform Article 1 as Section 1202 of Existing California Division 1, California subsequently amended Section 1202 of Existing California Division 1 in 1967. The amendment was adopted, on the recommendation of the California Law Revision Commission, to resolve an uncertainty (which existed by virtue of the adoption in 1965 of the Evidence Code (and, specifically, Sections 604, 605 and 606 thereof) in California) as to whether Section 1202 of Existing California Division 1 as it formerly read established a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof.

The 1967 amendments to Section 1202 of Existing California Division remove the requirement that the third-party document be "in due form" in order to be admissible as evidence. Further, the amendments specified that, while the document is admissible into evidence, the evidentiary effect is determined by a two-step process. As to the authenticity and genuineness of the document, a document in due form is presumed to be authentic and genuine. This presumption affects the burden of producing evidence. If the document is found to be authentic and genuine, the facts stated in the document by the third party are presumed to be true. This presumption is one affecting the burden of proof. Section 1202 of Existing California Division 1 further limits its applicability to actions arising out of contracts which authorize or require a third-party document. This limitation is stated in the Official Comment to Section 1-202 of Prior Uniform Article 1, but is not explicitly recognized in the statutory text.

***Recommended Modification to RA1: To retain California's current formulation of the law regarding the evidentiary effect of third party documents (currently contained, as set forth below, in Section 1202 of Existing California Division 1), before being adopted, Section 1-307 of RA1 should be modified to read as follows:***

**§ 1307. Documents Required of Third Party; Admissibility; Presumptions.**

**(1) A bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party is admissible as evidence of the facts stated in the document by the third party in any action arising out of the contract which authorized or required the document.**

**(2) In any action arising out of the contract which authorized or required the document referred to in subdivision (1):**

**(a) A document in due form purporting to be the document referred to in subdivision (1) is presumed to be authentic and genuine. The presumption is a presumption affecting the burden of producing evidence.**

**(b) If the document is found to be authentic and genuine, the facts stated in the document by the third party are presumed to be true. The presumption is a presumption affecting the burden of proof.**

### **Section 1-308 – Performance or Acceptance under Reservation of Rights.**

Section 1-308 of RA1 is substantively identical to Section 1207 of Prior Uniform Article 1, adopted without change in California as Section 1207 of Existing California Division 1. Section 1-308 of a RA1 recognizes a party's right to perform, or promise or assent to performance, under a reservation of rights without prejudicing the rights reserved. Section 1-308(b) of RA1 makes the provision inapplicable to accord and satisfaction.

### **Section 1-309 – Option to Accelerate at Will.**

Section 1-309 of RA1 would have no substantive effect on California law. Section 1-309 of RA1 limits an obligee's right to accelerate an obligation or require collateral "at will" or where such party deems itself insecure to situations where such party in good faith believes that the prospect of payment or performance is impaired. Section 1-309 further provides that the burden of establishing lack of good faith is on the party against whom the power to accelerate has been exercised. Section 1-309 of RA1 is identical, except for minor stylistic changes, to Section 1-208 of Prior Uniform Article 1, which was adopted without change as Section 1208 of Existing California Division 1.

### **Section 1-310 – Subordinated Obligations.**

Section 1-310 of RA1, which concerns subordination of obligations at issuance or by agreement, is substantively identical to Section 1-209 of Prior Uniform Article 1, which California adopted without variation in 1967. Section 1-310 of RA1 deletes the final sentence of Section 1-209 of Prior Uniform Article 1, which stated that the provision was declarative of existing law. Because the law reflected in Section 1-310 has been established law for some time, there is no need to preserve that final sentence; accordingly, the Committee recommends adoption of Section 1-310.

## **APPENDIX 1: CONFORMING AMENDMENTS**

### **A. CONFORMING AMENDMENTS TO OTHER ARTICLES (DIVISIONS)**

The revisions to Article 1 propose certain conforming amendments to other sections of Prior Uniform Commercial Code articles other than Article 1. All of these conforming amendments are appropriate for adoption in California.

The Committee recommends adoption of all of the conforming amendments to other articles, subject only to modifications required to conform to California Legislative style. **Thus, the conforming amendments to other articles should be modified to conform with the California practices of using the term "division" rather than "article," using the term "subdivision" rather than "subsection" and deleting the hyphen in section number references in the California Commercial Code. In addition, amendments to Article 2A of Prior Uniform Article 1 should be modified to conform to the codification of such provisions in Division 10, rather than Article 2A.**

The following sets forth a summary of the changes to other articles of the Prior Uniform Commercial Code proposed in RA1.

- *Changes to definition of "good faith."* Adoption of Section 1-201 of RA1 would centralize in Article 1 the definition of good faith applicable to all articles of the UCC, except for Article 5. Accordingly, the definitions of "good faith" in (i) paragraph (6) of subsection (1) of Section 2-103 of the Prior Uniform Commercial Code, adopted as paragraph (6) of subdivision (1) of Section 2103 of the California Commercial Code; (ii) paragraph (4) of subsection (a) of Section 3-103 of the Prior

Uniform Commercial Code, adopted as paragraph (4) of subdivision (a) of Section 3103 of the California Commercial Code; (iii) paragraph (6) of subsection (a) of Section 4A-105 of the Prior Uniform Commercial Code, adopted as paragraph (6) of subdivision (a) of Section 11105 of the California Commercial Code; (iv) paragraph (10) of subsection (a) of Section 8-102 of the Prior Uniform Commercial Code, adopted as paragraph (10) of subdivision (a) of Section 8102 of the California Commercial Code and (v) paragraph (43) of subsection (a) of Section 9-102 of the Prior Uniform Commercial Code, adopted as paragraph (43) of subdivision (a) of Section 9102 of the California Commercial Code, should all be deleted. Similarly, the references in the indexes of definitions to prior provisions defining good faith contained in (i) subsection (3) of Section 2A-103 of the Prior Uniform Commercial Code (Section 10103 of the California Commercial Code) and (ii) subsection (c) of Section 4-104 of the Prior Uniform Commercial Code (Section 4104 of Existing California Division 4) should be deleted. Finally, the references in the definitional cross-references appearing after Section 2A-518 and 2A-527 of the Prior Uniform Commercial Code should be revised to refer to Section 1-201(b) (20).

- *Changes relating to incorporation of course of performance rules into RA1.* As stated above, Section 1-303 of RA1, among other things, incorporates the course of performance rules, currently found in Sections 2-208 and 2A-207 of Prior Uniform Articles 2 and 2A (adopted in California as Sections 2208 and 10207 of Existing California Divisions 2 and 10), respectively. Accordingly, those sections should be deleted. In addition, Section 2-202 of the Prior Uniform Commercial Code (adopted in California as Section 2202 of the California Commercial Code) should be modified by substituting a reference to 1-303 of RA1 for the current citation to Section 2-202 of the Prior Uniform Commercial Code (Section 2202 of the California Commercial Code).
- *Changes relating to redesignation of rules relating to variation by agreement.* RA1 incorporates in Section 1-302 rules relating to variation of the effect of Code provisions formerly found in Sections 1-102 and 1-204 of Prior Uniform Article 1. Conforming changes of references to 1-102(3) of Prior Uniform Article I to 1-302 of Revised Uniform Article I should be made in Section 2A-518 (2), 2A-519(1), 2A-527(2), 2A-528(1) and Section 5-103(c) of the Prior Uniform Commercial Code.
- *Changes relating to general definitions.* The general definitions section of RA1 places all of the definitional provisions in subsection (b). Accordingly, the citation to the term “prove” in each of Section 3-103(a)(10) of the Prior Uniform Commercial Code and Section 4A-105(a)(7) of the Prior Uniform Commercial Code should be to Section 1-201(b)(8) of RA1. Additionally, Section 1-201 of RA1 incorporates certain new definitions and deletes certain others. In addition, certain definitions or portions of provisions formerly in the general definitions section have been moved to other sections of RA1.

## **B. CONFORMING AMENDMENTS TO NON-UCC STATUTORY PROVISIONS**

- For the reasons described at the end of the discussion of Part 2 above, in connection with the enactment in California of RA1, the provisions of Section 1206 of Existing California Division 1, as modified in the manner set forth below, should be recodified as Section 1624.5 of the California Civil Code as follows:

### **1624.5. Statute of Frauds for Kinds of Personal Property Not Otherwise Covered.**

(1) Except in the cases described in subdivision (2) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars (\$5,000) in amount or value of remedy unless there is some writing which indicates that a contract for sale

has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his or her authorized agent.

(2) Subdivision (1) of this section does not apply to contracts governed by the Commercial Code, including contracts for the sale of goods (Section 2201), contracts for the sale of securities (Section 8113) and security agreements (9201 and 9203).

(3) Subdivision (1) of this section does not apply to a qualified financial contract as that term is defined in paragraph (2) of subdivision (b) of Section 1624 if either (a) there is, as provided in paragraph (3) of subdivision (b) of Section 1624, sufficient evidence to indicate that a contract has been made or (b) the parties thereto, by means of a prior or subsequent written contract, have agreed to be bound by the terms of the qualified financial contract from the time they reach agreement (by telephone, by exchange of electronic messages, or otherwise) on those terms.

- For the reasons described in the discussion of Section 1-301 above, Section 1646.5 of the California Civil Code should be modified to read as follows:

**1646.5. Notwithstanding Section 1646, the parties to any contract, agreement, or undertaking, contingent or otherwise, relating to a transaction involving in the aggregate not less than two hundred fifty thousand dollars (\$250,000), including a transaction otherwise covered by subdivisions (a) through (f) of Section 1301 of the Commercial Code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not the contract, agreement, or undertaking or transaction bears a reasonable relation to this state. This section does not apply to any contract, agreement, or undertaking (a) for labor or personal services, (b) relating to any transaction primarily for personal, family, or household purposes, or (c) to the extent provided to the contrary in subparagraph (7) of subdivision (g) of Section 1301 of the Commercial Code.**

**This section applies to contracts, agreements, and undertakings entered into before, on, or after its effective date; it shall be fully retroactive. Contracts, agreements, and undertakings selecting California law entered into before the effective date of this section shall be valid, enforceable, and effective as if this section had been in effect on the date they were entered into; and actions and proceedings commencing in a court of this state before the effective date of this section may be maintained as if this section were in effect on the date they were commenced.**

- Section 1812.622 of the California Civil Code excludes from the definition of “rental purchase agreement” a lease or agreement that constitutes a security interest, as defined in Section 1201 of Existing California Division 1. RA1 places the general definition of security interest in Section 1-201(b)(35). Accordingly, Section 1812.622 should be modified to change the reference to the appropriate provision.

***Recommended Modifications to the California Civil Code: In connection with the adoption of RA1 in California, clause (4) of the second, undesignated paragraph of paragraph (d) of Section 1812.622 of the California Civil Code should be modified to delete the phrase: “(4) A lease or agreement that constitutes a security interest, as defined in Section 1201 of the***

**Commercial Code” and insert in its place “(4) A lease or agreement that constitutes a security interest, as defined in Section 1201(b)(35) of the Commercial Code.”**

- Sections 3061.5 and Section 3440.3 of the California Civil Code, Section 55702 of the California Food and Agricultural Code and Section 7152 of the Government Code each contains a reference to the definition of “buyer in the ordinary course” contained in subdivision (9) of Section 1201 of the California Commercial Code. The subdivision references should be changed to correspond to the subdivision numbers for those definitions in Section 1201 as revised.

**Recommended Modifications to the California Civil Code: In connection with the adoption of RA1 in California:**

- (a) ***Paragraph (e) of Section 3061.5 of the California Civil Code should be modified to delete the phrase “, as defined in subdivision (9) of Section 1201 of the Commercial Code,” and insert in its place the following: “, as defined in subdivision (b)(9) of Section 1201 of the Commercial Code.”***
- (b) ***The reference to “subdivision (9) of Section 1201 of the Commercial Code in Section 3440.3 of the California Civil Code” should be deleted and replaced with “subdivision (b)(9) of Section 1201 of the Commercial Code.”***

**Recommended Modification to Section 55702 of the California Food and Agriculture Code: In connection with the adoption of RA1 in California, paragraph (b) of Section 55702 of the California Food and Agriculture Code should be modified by deleting the phrase “, as that term is defined in subdivision (9) of Section 1201 of the Commercial Code,” and adding in lieu thereof “, as that term is defined in subdivision (b)(9) of Section 1201 of the Commercial Code.”**

**Recommended Modification to 7152 of the California Government Code: In connection with the adoption of RA1 in California, Section 7152 of the California Government Code should be amended to delete the reference to “Section 1201(9)” of the California Commercial Code contained therein and to add in its place a reference to “Section 1201(b)(9)” of the California Commercial Code.**

- Section 3343.5(c) of the California Civil Code and Section 574 of the Penal Code each contains references to the definitions of “purchaser” and “security interest” contained in subdivisions (33) and (37) of Section 1201 of the California Commercial Code. The subdivision references should be changed to correspond to the subdivision numbers for those definitions in Section 1201 as revised.

**Recommended Modifications to Section 3343.5(c) of the California Civil Code: In connection with the adoption of RA1 in California, paragraph (7) of Section 3343.5(c) of the California Civil Code should be modified by deleting “subdivision (33) of Section 1201 of the Commercial Code” and replacing it with “subdivision (b)(30) of Section 1201 of the Commercial Code.” The second sentence of paragraph (8) of Section 3343.5(c) of the California Civil Code should be modified by deleting “subdivision (37) of Section 1201 of the Commercial Code” and replacing it with “subdivision (b)(35) of Section 1201 of the Commercial Code.”**

**Recommended Modifications to Section 574 of the California Penal Code: In connection with the adoption of RA1 in California, subdivision (g) of Section 574 of the California Penal Code should be modified by deleting the phrase “subdivision (33) of Section 1201 of the**

**Commercial Code” and replacing it with “subdivision (b)(30) of Section 1201 of the Commercial Code.” *The second sentence of subdivision (h) of Section 574 of the California Civil Code should be modified by deleting “subdivision (37) of Section 1201 of the Commercial Code” and replacing it with “subdivision (b)(35) of Section 1201 of the Commercial Code.”***

Respectfully submitted,

The Uniform Commercial Code Committee  
of the Business Law Section  
of the State Bar of California